

1 J. Patrick Carey (State Bar #253645)
2 LAW OFFICES OF J. PATRICK CAREY
3 1230 Rosecrans Avenue, Suite 270
4 Manhattan Beach, California 90266
5 Tel: (310) 526-2237
6 Fax: (310) 356-3671
7 Email: pat@patcareylaw.com

8
9 Attorney for Defendant
10 ALAN JOHNSTON
11

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
14
15

16 CORY SPENCER, an individual;
17 DIANA MILENA REED, an
18 individual; and COASTAL
19 PROTECTION RANGERS, INC., a
20 California non-profit public benefit
21 corporation;

22 Plaintiffs,

23 v.

24 LUNADA BAY BOYS; THE
25 INDIVIDUAL MEMBERS OF THE
26 LUNADA BAY BOYS, including but
27 not limited to SANG LEE, BRANT
28 BLAKEMAN, ALAN JOHNSTON
aka JALIAN JOHNSTON, MICHAEL
RAE PAPAYANS, ANGELO
FERRARA, FRANK FERRARA,
CHARLIE FERRARA, and N.F.;
CITY OF PALOS VERDES
ESTATES; CHIEF OF POLICE
JEFF KEPLEY, in his representative
capacity; and DOES 1 – 10,

Defendants.

Case No. 2:16-cv-02129-SJO (RAOx)

**DEFENDANT JOHNSTON'S REPLY
TO PLAINTIFF'S OPPOSITION TO
MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE FOR SUMMARY
ADJUDICATION OF CLAIMS;
MEMORANDUM OF POINTS AND
AUTHORITIES (F.R.C.P. 56)**

Hearing Date: August 21, 2017

Hearing Time: 10:00 A.M.

Judge: Hon. James Otero

Courtroom: 10C

MEMORANDUM OF POINTS AND AUTHORITIES

I. EVIDENCE STATED BY THE PLAINTIFF'S IN SUPPORT OF THEIR OPPOSITION DOES NOT AMOUNT TO SUFFICIENT EVIDENCE TO SUPPORT THE CLAIMS ALLEGED IN THE COMPLAINT

Plaintiffs facts as alleged in their opposition to Defendant Johnston's ("Johnston") motion for summary judgment are insufficient to support the claims alleged in the complaint.

A. Plaintiff's Evidence as Stated Does Not Support a Claim that Defendant Johnston is Part of a Conspiracy

The following is the evidence Plaintiffs claim amounts to proof that Johnston is part of a conspiracy:

1. Johnston is one of the top ten people that surf Lunada Bay regularly for big waves. (Opposition, p. 49:18-25).
2. Johnston grew up three blocks from Blakeman. (Opposition, p. 50:14-16).
3. Johnston graduated from Palos Verdes Peninsula High School. (Opposition, p. 50:24-26).
4. Johnston has surfed at Lunada Bay with pretty much everyone on the defendant list. (Opposition, p. 51:13-15).
5. Johnston's statement that there is an understanding of ground rules for surfing Lunada Bay. (Opposition, p. 51:20-22).
6. Johnston's statement that he had locals dropping in on him for 5 to 10 years and was heckled from "sun up to sun down." (Opposition, p. 54:7-15).
7. Johnston's statement that he never brought any friends to Lunada Bay from outside the area because it is disrespectful to those who

1 have paid dues; that it is something you don't do in the surfing
2 world. (Opposition, p. 61:13-19).

3 8. Johnston's statement that Lunada Bay is their own little sanctuary.
4 (Opposition, p. 63:25-27).

5 9. Johnston's statement that Lunada Bay is really crowded and there
6 isn't excess waves for outsiders. (Opposition, p. 64:5-8).

7 10. Johnston's text messages referring to non-local surfers as trolls.
8 (Opposition, p. 83:14-18).

9 11. Johnston's text message that someone could be a big help if
10 they could assist with an alleged police setup. (Opposition, p. 84:6-
11 10).

12 12. Johnston's text message that he is being sued for being a local.
13 (Opposition, p. 97:16-21).

14 The above evidence can be summarized as follows and is insufficient
15 to prove Defendant Johnston's membership in any alleged conspiracy to
16 *exclude* outsiders: Johnston grew up surfing Lunada Bay. He was hazed
17 for several years by getting heckled by other surfers who wanted him to earn
18 his place to be a regular surfer at Lunada Bay. He grew to become a top tier
19 surfer at the bay. His one communication of any agreement to participate in
20 any activity at Lunada Bay was to someone who was an "outsider." No
21 evidence shows communication or agreement between Defendant Johnston
22 or any other Defendant's to engage in an effort to *exclude outsiders* from
23 Lunada Bay, as alleged. At most, Defendant Johnston has admitted to
24 heckling new surfers at Lunada Bay, just as he was when he first started.
25 While it can be proven that he was rude to outsiders, there is simply no proof
26 he ever entered into any agreement or conspiracy to exclude anyone from
27 Lunada Bay. path of anyone, or took any other action to *exclude* anyone
28

1 from Lunada Bay. In no way does this evidence amount to participation in a
2 conspiracy to engage in the acts alleged by the Plaintiffs.

3 B. Plaintiff's Evidence as Stated Does Not Support a Claim
4 that Defendant Johnston Committed a Battery on Plaintiff
5 Reed

6 There are two pieces of evidence to support the claim of battery: (1)
7 the statement of Plaintiff Reed ("Reed") and (2) the video of the event.
8 Plaintiffs submit in their opposition the following statement by Plaintiff Reed
9 during her deposition: "I remember Mr. Johnston opening the can of beer in
10 a way that sprayed my arm and my camera." (Opposition, pg. 130:27-131:7).

11 *i. Evidence Lacks Proof of Intent by Johnston*

12 The elements of battery require that the defendant intentionally do an
13 act directed at the plaintiff. *Garcia v. City of Merced*, 637 F. Supp. 2d 731,
14 748 (E.D. Cal. 2008). Johnston did intentionally opened the beer can, but
15 there is insufficient evidence that he intended any beer spray or touch
16 Plaintiff Reed. Johnston is seen in the video to be approximately three feet
17 from Reed when he opened the beer. He then offers a beer to Reed and
18 opens one for himself. He never shakes the can or angled it toward Reed.
19 He immediately puts it to his mouth to drink.

20 *ii. Evidence Lacks Proof of Injury, Damage, Loss, or*
21 *Harm to Reed*

22 With regards to beer hitting Reed's camera, that fact is irrelevant as to
23 whether or not she was battered. Other than an intentional act, a battery
24 also requires "injury, damage, loss or harm." *Id.* As the small amount of
25 foam from the beer hits the sleeve of Reed's blouse, she can be seen
26 smiling. Further, Plaintiff's have submitted no evidence that her blouse was
27 damaged from the act. Even if the court finds Johnston intentionally sprayed
28

1 the beer at Reed, there is simply no evidence injury, damage, loss or harm
2 that can support the claim.

3 A. Plaintiff's Evidence as Stated Does Not Support a Claim
4 that Defendant Johnston Committed an Assault on Plaintiff
5 Reed

6 Assault requires the demonstration of unlawful intent by one person to
7 inflict an immediate injury on another. *Lowry v. Standard Oil Co.*, 63 Cal.
8 App. 2d 1, 6-7, 146 P. 2d 57 (1944). Mere words, however threatening, will
9 not amount to an assault. 5 Witkin Summary 10th (2010 Supp.) Torts
10 Section 383, p. 81 (citing Restatement (Second) of Torts Section 31,
11 (2010)).

12 The following is the evidence Plaintiffs claim amounts to an assault:

13 1. *From Plaintiff Reed's deposition: "I felt – felt like I could have even*
14 *been raped. I mean, it was incredibly frightening. I felt helpless."*
15 *(Opposition, pg. 126:10-12).*

16 Reed's feelings during the event are irrelevant. What is relevant is
17 Johnston's intent. Further, her actions and appearance in the video
18 contradict this statement.

19 2. *From Plaintiff Reed's deposition: "Just that whole memory of the*
20 *event has caused me to be fearful and just really affected my piece*
21 *of mind."* (Opposition, pg. 126:12-14).

22 This evidence does not support the claim of assault. Reed's memory
23 is not relevant. Rather, what is relevant is the intent of Johnston at the time
24 of the event as well as his ability to inflict an immediate injury, evidence of
25 which is lacking.

1 3. *From Plaintiff Reed's deposition: "I remember there was a moment*
 2 *when he seemed like he purposefully removed his towel in order to*
 3 *expose himself."* (Opposition, pg. 126:20-22).

4 Reed states that Johnston exposed himself while he was changing into
 5 his wetsuit. There is no evidence that he had any ability whatsoever to inflict
 6 an immediate injury on Reed while doing so. Further, "seeming like"
 7 Johnston was intending an act is not evidence that Johnston actually
 8 intended to do act. Further, the act of changing into a wetsuit itself requires
 9 the action of changing. It appears from Reed's own statement that Johnston
 10 was using a towel while changing. There is no evidence he forced her to
 11 watch him change into his wetsuit. There are no issues which could be
 12 decided by a jury to support a claim of assault.

13 4. *From a Declaration of Plaintiff's counsel Franklin: Defendants*
 14 *Blakeman and Johnston "rushed" Plaintiff Reed, approached her in*
 15 *a menacing manner, harassed her with sexually aggressive*
 16 *comments, and intentionally sprayed beer on her camera.*
 17 *(Opposition, pg. 127:26-128:9).*

18 Defendant Johnston objects to the consideration of statements from
 19 counsel as facts upon which the court can base its decision. Mr. Franklin
 20 was not a witness to any alleged assault. His declaration is hearsay and
 21 irrelevant.

22 5. *From the video of the incident: "fucking sexy baby...want to film it?";*
 23 *"I seen you and I think I touched myself a little bit"; "I can do*
 24 *whatever I want."*

25 As stated above, mere words cannot amount to an assault. This
 26 statement does not support the Plaintiff's claim.

1 **II. CONCLUSION**

2 Based on the foregoing, Defendant Johnston respectfully requests this
3 honorable Court to grant his motion for summary judgment.

4
5 DATED: August 17, 2017

LAW OFFICES OF J. PATRICK CAREY

6
7 By: /s/ J. Patrick Carey
8 J. Patrick Carey
9 Attorney for Defendant
10 ALAN JOHNSTON
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28